Supreme Court, U.S.
FILED

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No. 02-1375 MAR 14 2003

OFFICE OF THE CLERK

In the Supreme Court of the United States

MARK SCHALL, Petitioner

v.

THE PEOPLE OF THE STATE OF COLORADO

ON PETITION FOR A WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

Mark Schall, pro se
c/o Joseph A. Lazzara
Sheridan Park Eleven
8704 Yates Dr., # 210
Westminster, CO 80031
(303) 429-6200

25 pp

QUESTIONS PRESENTED FOR REVIEW

1) Under Colorado law, a law enforcement officer that has probable cause to believe that any person was driving a motor vehicle while under the influence of alcohol (substantially affected by alcohol) and such conduct is the proximate cause of the death of another, such person commits vehicular homicide. The District Court suppressed the blood draw and test results ruling that the officer lacked probable cause to require chemical testing. The Colorado Supreme Court reversed the suppression ruling of the District Court ruling that the police officer had probable cause to arrest Defendant for committing an "alcohol-related driving offense". Colorado recognizes Driving under the Influence of Alcohol (DUI or "substantially affected by alcohol") and Driving While Ability Impaired by Alcohol (DWAI – "affected by alcohol to the slightest degree"), which is a much lower standard. The question presented is whether the court properly found probable cause for a police officer to order a felony blood draw, without consent, when that officer fails to testify at the suppression hearing and the only evidence presented by other officers is that an accident occurred involving death and an odor of an alcoholic beverage within Defendant's vehicle was detected, which is the result of unopened broken beer bottles damaged as the result of the accident?

2) Whether the Colorado Supreme Court erroneously applied the wrong legal standard to Defendant's case?

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In the Supreme Court of the United States

No.

MARK SCHALL, Petitioner

v.

THE PEOPLE OF THE STATE OF COLORADO

PETITION FOR A WRIT OF CERTIORARI

The Defendant, Mark Schall, pro se, respectfully petitions for a writ of certiorari to review the judgment of the Colorado Supreme Court.

OPINIONS BELOW

The opinion of the Colorado Supreme Court is reported at 59 P. 3d 848 and is contained within the Appendix. The opinion of the Douglas County District Court is unpublished and the oral order is set forth in the Appendix.

JURISDICTION

The judgment of the Colorado Supreme Court was entered on December 16, 2002. A petitioner for rehearing is not allowed due to the fact that the case was brought pursuant to an interlocutory appeal. The jurisdiction of this Court is invoked pursuant Rule 10 (b) and (c) of the Supreme Court Rules.

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions, C.R.S. 18-3-106 and C.R.S. 42-4-1301, are set forth in the appendix.

STATEMENT

The case at bar arises out of the Defendant Schall being charged with vehicular homicide in violation of C.R.S. 18-3-106(4) and other related charges. Defendant filed various suppression motions prior to trial, including a Motion to Suppress and/or Dismiss for Lack of Probable Cause to Arrest and to Require Chemical Testing in violation of Defendant's Fourth Amendment rights to be free from unreasonable search and seizure.

The statute at issue provides in pertinent part as follows: "If a law enforcement officer has probable cause to believe that any person was driving a motor vehicle in violation of paragraph (b) of subsection (1) of this section, such person . . . shall take and complete . . . any test . . . for the purposes of determining the alcohol content or drug content within his or her system." C.R.S. 18-3-106(4). Further, subsection (1)(b) provides, "If a person operates or drives a motor vehicle while under the influence of alcohol . . . and such person's conduct is the proximate cause of the death of another, such person commits vehicular homicide." C.R.S. 18-3-106(1)(b).

The matter proceeded to hearing wherein the Douglas County District Attorney's office called two witnesses in response to Defendant's motions, Trooper Caldwell and trooper Driscoll of the Colorado State Patrol. Trooper Caldwell testified that when he arrived on scene he observed a three- car injury accident, involving two semis hauling trailers and one small

automobile. The driver of the automobile, Defendant Schall, had already been transported to the hospital due to injuries. The Trooper further informed the court that he determined one of the drivers of the semis veered off the roadway to avoid the accident, hit an embankment and was pronounced dead at the scene. Trooper Caldwell also testified that he detected a strong odor of an alcoholic beverage emitting from the vehicle and saw several broken bottles in the vehicle but did not know whether the lids were still on the containers, which was subsequently verified.

Trooper Driscoll testified that he likewise had no contact with the Defendant but contacted his dispatcher via radio and requested that the dispatcher contact the Adams County communication center to send a trooper from that jurisdiction to contact Defendant at the hospital. The communications center sent Trooper Swisher to the hospital to contact Defendant. Trooper Driscoll testified that he instructed the communications center to have the trooper do an alcohol evaluation on the driver to determine whether alcohol was involved in the case. Further, Trooper Driscoll stated that other than the broken bottles in the vehicle nothing else led him to believe that alcohol could be a factor in the case.

Trooper Swisher never testified at the hearing and provided no reports referencing his alcohol evaluation of the Defendant. Trooper Swisher ordered a non-consensual blood draw on Defendant pursuant to C.R.S. 18-3-106.

The District Court of Douglas County suppressed the blood test finding that other than the mere odor of alcohol within the vehicle there was no evidence that Defendant ingested any alcohol or that the officers had some reason to believe Defendant was under the influence of alcohol at the time of the forced blood draw. The District Court stated all I have is an accident and

broken beer bottles in a car and as such suppressed the blood test and the results.

The District Attorney's Office pursuant to an interlocutory appeal, brought the issue before the Colorado Supreme Court. The Colorado Supreme Court determined that the issue before them was "...whether the police had probable cause to arrest Defendant for committing an alcohol-related driving offense." The Court determined that the police had probable cause to believe that Defendant caused the accident, that the circumstances of the collision were consistent with Defendant driving under the influence of alcohol and the smell of alcoholic beverage at the scene and the presence of broken beer bottles in Defendant's car supported the reasonableness of this inference and as such the police had probable cause to believe that Defendant had committed an alcohol-related driving offense. Thus, the Colorado Supreme Court reversed the decision of the District Court.

REASONS FOR GRANTING THE PETITION

The Colorado Supreme Court held that an accident where the defendant driver is at fault coupled with odor of an alcoholic beverage within the vehicle, even though the breakage of bottles was due to an accident, equates to probable cause to conduct an involuntary blood draw, in spite of no evidence indicating the Defendant even consumed any alcoholic beverages. The Colorado Supreme Court's decision is in conflict with several courts' decisions throughout the United States. Further, the decision is incorrect as the court applied the wrong legal standard, which creates a lower burden upon the police in order to forcibly draw a person's blood against their will. Further, the decision of the Colorado Supreme Court threatens the rights of an accused and makes probable cause meaningless when it applies to alcohol related offenses as no indicia

of consumption or intoxication is required. Additionally, the decision allows probable cause to be determined by the Court although the police officer sought to develop probable cause through another officer by requesting the officer to conduct an alcohol evaluation and that officer never has to appear, testify or even provide reports, which may be exculpatory or inculpatory in nature.

A. The Colorado Supreme Court Applied the Wrong Legal Standard

In the case at bar, the Court applies the wrong legal standard and framed the issue and ruling related to the police having "probable cause to arrest the Defendant for an alcohol-related driving offense". The proper issue is whether Trooper Swisher had probable cause to arrest Defendant for driving under the influence of alcohol and was such conduct the proximate cause of a death. *See,* C.R.S. 18-3-106.

Colorado recognizes two categories of alcohol offenses: Driving Under the Influence (DUI) which is defined as "driving a vehicle when a person has consumed alcohol ... affects the person to a degree that the person is substantially incapable, either mentally or physically, or bother mentally and physically, to exercise clear judgment, sufficient physical control, or due care in the safe operation of a vehicle" and a lesser standard of Driving While Ability Impaired by Alcohol (DWAI) which requires that the driver be affect by alcohol to the slightest degree. C.R.S. 42-4-1301.

Under the alcohol statute a police officer having probable cause of either DUI or DWAI can request the driver to submit to a blood or breath test. The test in this case is voluntary and can be refused, which may impact the suspect's driving privileges. However, the vehicular homicide statute, which applies in the case at

bar, creates a higher standard and requires the police to have probable cause that the driver was under the influence or substantially affected by alcohol not just affected by alcohol to the slightest degree and was the proximate cause of a death. The Court did not address this issue and the ruling refers only to an alcohol-related offense which is both the DUI and DWAI. The Court applied a relaxed standard in violation of the law of the State which infringes upon the Defendant's Fourth Amendment rights to be free from unreasonable searches and seizures lacking probable cause.

B. The Colorado Supreme Court's Decision Conflicts With Decisions of Other Courts In the Union

The District Court of Appeal of Florida, First District, in *People v. White*, 492 So. 2d 1163, 1164 (Fla. Dist. App. 1st 1986) held that police officers lacked probable cause to order a blood test at the hospital following a fatal accident did not exist because the police had no indication that the defendant had anything of an alcoholic nature to drink, there was no indicia of intoxication or consumption and defendant had not spoken to any police officers regarding the accident.

The Arizona Supreme Court has reiterated that fact that drawing blood is a bodily invasion and therefore a search under the Fourth Amendment, which requires probable cause to pass constitutional muster. *State v. Jones*, 49 P. 3d 273, 281 (Ariz. 2002).

Further, this Court in *Schmerber v. State of California*, 384 U.S. 757, 86 S. Ct. 1826, 16 L.Ed. 2d 908 (1966) established the standard for non-consensual blood draws. The Court stated that the overriding function of the Fourth Amendment was to protect personal privacy and dignity against unwarranted

intrusion by the State absent probable cause. *Id.* at 1834. The Court found probable cause after evaluating and utilizing a factor test.

C. The Colorado Supreme Court's Decision May Create Serious Adverse Consequences

The decision of the Colorado Supreme Court lowering the standard and burden placed upon the prosecution by statute may threaten a defendant's constitutional right to be free of unreasonable searches and seizures. Further, the decision allows the Court to substitute its judgment for the police officer's training, experience and knowledge when a police officer specifically requests additional investigation to determine whether a suspect is under the influence of alcohol prior to requesting or ordering the suspect to undergo a blood draw.

Additionally, the decision allows the prosecution to avoid the requirement of producing a witness at a hearing or even a report to establish that the investigating officer conducted an alcohol evaluation and the results of the investigation. The witness or report could be exculpatory in nature. The police officer that arrests a suspect or orders a blood draw must testify at a hearing to determine whether that officer in fact had probable cause to arrest the individual and require a blood test. Otherwise, the Defendant is denied his opportunity to confront his accuser and ferret out whether probable cause even exists.

CONCLUSION

The Petitioner respectfully requests that this Honorable Court grant the petition for a writ of certiorari.

BEST AVAILABLE COPY

Respectfully submitted,

Mark Schall, pro se

APPENDIX A

C.R.S. 18-3-106 Vehicular Homicide.

(1)(b) If a person operates of drives a motor vehicle while under the influence of alcohol or one or more drugs, or a combination of both alcohol and one or more drugs, and such conduct is the proximate cause of the death of another, such person commits vehicular homicide. This is a strict liability crime.

(IV) "Driving under the influence" means driving a vehicle when a person has consumed alcohol or one or more drugs, or a combination of alcohol and one or more drugs, which alcohol alone, or one or more drugs alone, or alcohol combined with one or more drugs affect such person to a degree that such person is substantially incapable, either mentally or physically, or both mentally and physically, of exercising clear judgment, sufficient physical control, or due care in the safe operation of the vehicle.

APPENDIX B

C.R.S. 42-4-1301 Driving under the influence – driving while impaired

(1)(f) "Driving under the influence" means driving a vehicle when a person has consumed alcohol or one or more drugs, or a combination of alcohol and one or more drugs, which alcohol alone, or one or more drugs alone, or alcohol combined with one or more drugs affects the person to a degree that the person is substantially incapable, either mentally or physically, or both mentally and physically, of exercising clear judgment, sufficient physical control, or due care in the safe operation of a vehicle.

(1)(g) "Driving while impaired" means driving a vehicle when a person has consumed alcohol or one or more drugs, or a combination of alcohol and one or more drugs, which alcohol alone, or one or more drugs alone, or alcohol combined with one or more drugs affects the person to the slightest degree so that the person is less able than the person ordinarily would have been, wither mentally or physically, or both mentally and physically, to exercise clear judgment, sufficient physical control, or due care in the safe operation of a vehicle.

APPENDIX C

OPINION OF THE DOUGLAS COUNTY DISTRICT COURT

The case of People v. Roybal involved officers with knowledge that an accident has occurred and a defendant who had an odor of alcohol on his breath, I think. Those are two factors in that case?

Well, I have some problems here. What I have pending is a motion to suppress and/or dismiss for lack of probable cause to arrest and to require chemical testing.

From the evidence presented today, I cannot tell if there ever was an arrest at any point in time. There was an individual in the hospital, but very often that does not amount to a restraint associated with arrest. And in this case I simply can't tell when, if at any point in time, Mr. Schall was arrested. So I'm without evidence to determine probable cause to arrest.

The question comes down to probable cause to do something in this case. And counsel have made reference to the applicable standard. But what the Court has to determine is whether or not the officers at the time they were seeking some action, taking testing in this case, I guess, is where we are at this point, had reasonable grounds to believe that an offense had been committed by this individual. It's not that they had to have proof beyond a reasonable doubt. They had to have reasonable grounds to believe that he had been involved in the commission of an offense. As charged, we have vehicular homicide, and we have DUI.

Now, what did the officers have at least based on this status of the evidence at the time that they had chemical testing performed? The Court can't tell from

the status of the evidence whether it was a voluntary or involuntary blood draw, but there was blood taken. So I'm not sure that that' real important at this point in time. I've had no evidence to establish that there was consensual taking of blood.

I have at the best, and I suppose at the worst as far as the defense is concerned, a head-on collision in the northbound lanes of traffic on Highway 85. That's the defense involvement. I have a vehicle that was driven by the defendant in which officers detected an odor of alcoholic beverage, in which they saw one, two, or perhaps more broken bottles. No one can put a number on it, and certainly they wouldn't necessarily be required to.

So at that time I have odor of alcohol or an alcoholic beverage coming from a vehicle in which there are broken bottles of alcohol, and I have an accident. And that's all I have. I do not have any indication of ingestion or inference of ingestion from Mr. Schall or by Mr. Schall; I don't have any indication of odor of alcoholic beverage; I don't have any indication of admission of consumption of alcohol. And I understand he didn't make any statements. That would only be a factor to consider. But I don't have any evidence to show that at the time blood was taken the officers had some reason to believe Mr. Schall was under the influence of alcohol or in some way even affected by alcohol. There's nothing to show Mr. Schall's state of intoxication by odor of breath - - odor of alcohol on his breath or anything else that's commonly associated with drinking and driving.

So I have an accident, broken beer bottles in the car. And that's all I have to tie anything to Mr. Schall at this point as far as probable cause to either arrest, which I can't determine at this point, or to go forward with further chemical testing.

I don't find that that's probable cause for anything in this case. And the Court is compelled under those circumstances to grant the motion to suppress chemical testing finding that it was acquired or elicited without either a showing (a) consent or (b) probable cause to have Mr. Schall submit to it.

Like I say, I can't even address the arrest situation, so I can't even go there at this point in time. But I'll grant the motion. There's a total lack of evidence for me to go anywhere with it, quite frankly.

APPENDIX D

SUPREME COURT, STATE OF COLORADO
Two East 14th Avenue
Denver, Colorado 80203
Case No. 02 SA 263

Interlocutory Appeal from the Douglas County District Court, Case No. 01 CR 332
Honorable Thomas J. Curry, Judge

Plaintiff – Appellant:

THE PEOPLE OF THE STATE OF COLORADO,

v. Defendant – Appellee:

MARK SCHALL.

ORDER REVERSED
EN BANC
December 16, 2002

JUSTICE HOBBS delivered the Opinion of the Court.

In this interlocutory appeal, filed pursuant to C.A.R. 4.1 and section 16-12-102(2), 6 C.R.S. (2002), the prosecution appeals the district court's suppression of blood alcohol evidence that the Colorado Highway Patrol obtained from the defendant, Mark Schall. We reverse the district court's suppression order. The district court incorrectly concluded that the police lacked probable cause to arrest Schall for an alcohol-related offense, a precondition to collecting blood from him. The facts supporting probable cause in this case are that an

eyewitness observed Schall driving his car into oncoming traffic, the police smelled the odor of an alcoholic beverage from his badly wrecked car, and the police saw broken beer bottles inside the car. Because the constitutional prerequisites to collecting a blood sample*1* from a non-consenting suspect are satisfied in this case, the Fourth Amendment to the United States Constitution does not bar admission of the blood alcohol evidence.

1.

This case involves an automobile accident that occurred in the early morning of April 2, 2001, on Colorado Highway 85 in Douglas County. The facts at the suppression hearing were that Schall's car crossed the centerline of the highway and collided with a semi-truck headed in the opposite direction. A second semi-truck, following behind the first, veered off the road to avoid Schall and the first truck. In the process, the second truck overturned, killing the driver.*2* Schall was seriously injured. The police did not have an opportunity to interview Schall or conduct a roadside sobriety test before a helicopter evacuated him to a hospital.

The police relied on facts at the scene of the accident to establish probable cause to believe that Schall was driving under the influence of alcohol.*3* First, an eyewitness saw Schall driving over the centerline of the highway and striking the semi-truck. The police observed that there were no skid marks, which would have indicated that Schall tried to brake or dodge an animal or other obstacle in the road and lost control of his vehicle before colliding with the semi-truck.

Second, the police smelled a strong odor of an alcoholic beverage from Schall's car. The police saw several broken beer bottles in the car, along with one intact

bottle. **4** Based on the circumstances of the accident and the smell of an alcoholic beverage from Schall's badly wrecked vehicle, the police ordered blood draws while Schall was undergoing treatment for injuries he sustained in the accident. Schall did not consent to the collection of these samples. **5** The samples were obtained within two hours of the accident.

Based in part on the test results from Schall's blood draws, the prosecution charged him with vehicular homicide **6** and driving under the influence of alcohol, drugs, or both. **7** In a pretrial motion, Schall sought to suppress the results of his blood tests, arguing that the police obtained the evidence without probable cause. After a hearing, the trial court granted Schall's motion. It determined that the information known to the police at the time of the blood draws was not sufficient for probable cause to believe that Schall had committed an alcohol-related driving offense.

II.

We hold that probable cause existed for Schall's blood draws and testing. The facts at the suppression hearing were that Schall caused the accident by driving his car into oncoming traffic, the interior of his badly wrecked car smelled of an alcoholic beverage, and the police observed broken beer bottles in the car. Because the constitutional prerequisites to collecting a blood sample from a non-consenting suspect are satisfied in this case, the Fourth Amendment to the United States Constitution does not bar admission of the blood alcohol evidence.

A. Standard of Review

In reviewing a suppression appeal, we defer to the trial court's findings of fact if they are supported by the record and review the trial court's legal conclusions de

novo. E.g. People v. Hebert, 46 P. 3d 473, 480 (Colo. 2002).

The taking of blood evidence from one's person is subject to the protection of the Fourth Amendment to the United States Constitution. People v. Diaz, 53 P. 3d 1171, 1174 (Colo. 2002). We have enumerated four criteria for evaluating the constitutionality of warrantless, non-consensual blood draws to test for the presence of alcohol: (1) there must be probable cause for the arrest of the defendant on an alcohol-related driving offense; (2) there must be a clear indication that the blood sample will provide evidence of the defendant's level of intoxication; (3) exigent circumstances must exist which makes it impractical to obtain a search warrant; and (4) the test must be a reasonable one and must be conducted in a reasonable manner. People v. Sutherland, 683 P. 2d 1192, 1194 (Colo. 1984).

We determine that the prosecution met each of these criteria, requiring us to reverse the trial court's order suppressing evidence from Schall's blood draws.

B. Application of the Sutherland Test

The crux of this interlocutory appeal is the first prong of the Sutherland test, whether the police had probable cause to arrest Schall for committing an alcohol-related driving offense. The police have probable cause to arrest when the facts and circumstances known to the police are sufficient to warrant the belief by a reasonable and prudent person that the defendant committed an alcohol-related driving offense. People v. MacCallum, 925 P. 2d 758, 762 (Colo. 1996). The probable cause determination rests on all of the facts and circumstances known to the police at the time of the arrest. Id.; People v. Washington, 865 P. 2d 145, 147 (Colo. 1994). Absolute certainty that the defendant committed the offense is not necessary; rather, probable

cause involves that degree of certainty upon which reasonable and prudent people rely in making decisions in everyday life. MacCallum, 925 P. 2d at 762; People v. Thompson, 793 P. 2d 1173, 1175 (Colo. 1990).

In MacCallum, we reviewed the circumstances of a head-on collision from which the defendant driver had been transported to the hospital. The police could not ascertain the smell of an alcoholic beverage at the scene, due to MacCallum's evacuation and the extent of the wreckage. Nevertheless, we determined that the police had probable cause to take a blood draw from MacCallum, based on witness statements that he had been weaving across traffic lanes for a number of miles and drove into an oncoming vehicle. MacCallum, 925 P. 2d at 762-63.

In MacCallum, we reviewed and distinguished two cases which held that no probable cause existed for an alcohol-related offense. In People v. Reynolds, 895 P. 2d 1059, 1062 (Colo. 1995), we held that a driver's one-car accident buttressed by the driver's admission to drinking three beers, six to nine hours before the accident, did not meet the standard of probable cause, in the absence of evidence that the accident occurred as a result of the drover's misconduct or due to the influence of alcohol. In People v. Roybal, 655 P. 2d 410, 413 (Colo. 1982), we held that the odor of an alcoholic beverage on the defendant was insufficient to support probable cause when there was no evidence that the collision occurred as a result of the defendant's misconduct. On the other hand, in People v. Sutherland, 906 P. 2d 607, 609-10 (Colo. 1995), we held that probable cause existed based on evidence that the defendant was at fault for a traffic accident resulting in death and serious injury, the presence of empty beer cans near the accident scene, and the odor of an alcoholic beverage on the defendant's breath.

Our Fourth Amendment jurisprudence contains both guidance and caution. A court must take into account the totality of the circumstances known to the police. Facts in combination may support probable cause, whereas facts in isolation may not. See People v. Altman, 960 P. 2d 1164, 1171 (Colo. 1998); Wayne R. LaFave, Search and Seizure § 3.2(e) at 70 (3d ed. 1996). In evaluating probable cause, the police may use their judgment, experience, and training in evaluating the circumstances and assessing the combined importance of the individual facts. Henderson v. People, 879 P. 2d 383, 392 (Colo. 1994)("Due consideration should be given to a law enforcement officer's experience and training in evaluating the significance of the officer's observations relevant to probable cause.")

Probable cause may be based on circumstantial evidence, and the police are entitled to draw appropriate inferences from the circumstantial evidence, even though the evidence might also support other inferences. See People v. Hebert, 46 P.3d 473, 482 (Colo. 2002) (quoting People v. Hakel, 870 P. 2d 1224, 1229 (Colo. 1994)).

Here the police had probable cause to believe Schall caused the accident by driving into oncoming traffic. They found no skid marks, animal remains, or roadway obstructions that might explain the cause of the accident. They smelled the odor of an alcoholic beverage coming from within the open area of the vehicle accessible to the driver. They observed broken and intact beer bottles in the wreckage, but, due to the extent of the vehicle's damage, they could not tell whether one or more of the bottles had been opened prior to the accident or whether the bottles had all been capped and all but one were shattered in the collision. They could not interview Schall at the scene due to his emergency evacuation.

The trial court determined that the circumstances of the head-on collision, the smell of an alcoholic beverage in the vehicle, and the presence of broken beer bottles did not support probable cause. We disagree. Like MacCallum and unlike Reynolds and Roybal, Schall caused the head-on accident by driving into the opposite lane of traffic. Like MacCallum, based on the knowledge and experience of officers investigating the scene, the circumstances of the collision were consistent with Schall driving under the influence of alcohol. The smell of an alcoholic beverage at the scene and the presence of broken beer bottles in Schall's car supported the reasonableness of this inference, as in Shepherd. Under these circumstances, the police had probable cause to believe that Schall had committed an alcohol-related offense, satisfying the first criterion of our Sutherland test.

The second prong of the Sutherland test requires clear indication that a blood draw will show the amount of alcohol, if any, in the defendant's blood at the time of the alcohol-related offense. Sutherland, 683 P. 2d at 1194. If the police wait too long, a blood test will be ineffective. Likewise, if a defendant drank heavily after an offense, a blood test might not show the level of alcohol in the defendant's blood at the time of the offense. The timing of the blood draw is therefore significant to the reliability of the blood evidence. A blood test that will not produce reliable evidence is unreasonable under the Fourth Amendment because there is no state interest to balance the invasion of the defendant's body.

Here, the police made the decision to take the blood draws in a timely fashion. There was clear indication that the procedure would provide evidence of Schall's blood alcohol level. The second Sutherland criterion is satisfied.

The third prong of the Sutherland test requires that exigent circumstances exist for police proceeding without a search warrant. Sutherland, 633 P. 2d at 1194. Because alcohol dissipates quickly in the blood, exigent circumstances exist "when time has elapsed while the driver is transported to a hospital and the investigating officer is detained at the accident scene." Shepherd, 906 P. 2d at 610. In this case, Schall had been airlifted to a hospital. Exigent circumstances existed for investigating officers at the scene to direct a hospital blood draw. The third Sutherland criterion is satisfied.

Finally, a blood test must be reasonable one, and must be conducted in a reasonable manner. Sutherland, 683 P. 2d at 1194. A blood test is reasonable when it is "an effective means of determining the degree to which a person is under the influence of alcohol." Shepherd, 906 P. 2d at 611. The police conduct the test in a reasonable manner when it is "administered in a hospital according to accepted medical practice." Id. There is no challenge in this case to the means the police chose to extract and test Schall's blood. [9] The test was administered in a hospital, presumably in accord with accepted medical practice. The fourth Sutherland criterion is satisfied.

III.

Accordingly, we reverse the trial court's suppression and remand this case for further proceedings consistent with this opinion.

1 At the suppression hearing, counsel for Schall requested suppression of the blood draw evidence. The trial court suppressed the blood draw evidence and we review only this question.

2 Tragically, the drivers of the two trucks were brothers.

3 In addition to the two facts listed, the officers obtained a statement from a paramedic who treated Schall who said that Schall smelled of alcohol. However, the trial court found that the police did not have this information when they dispatched an officer to the hospital to collect the blood sample from Schall.

4 A follow-up investigation performed many months after the accident revealed that all of the bottles were capped when broken. Troopers at the scene did not 9and perhaps could not, due to the extent of the wreckage) ascertain whether all of the caps were on the bottles, and consequently did not know whether any bottles were open at the time of the accident.

5 The officer dispatched to the hospital did not testify at the suppression hearing, and the trial court found there was no evidence that Schall consented. The trial court therefore correctly presumed that Schall did not consent to the blood draws.

6 §18-3-106(1)(b), C.R.S. (2001).

7 § 42-4-1301, 11 C.R.S. (2001).

8 This is an important distinction from Reynolds, where the police did not know whether the defendant's misconduct had caused the accident. Reynolds, 895 P. 2d at 1062.

9 Schall apparently intends to claim at trial that the evidence is not reliable because laboratory tests of the same sample differed from each other, with one test indicating a blood alcohol level of .057 and the other indicating .111. This question is not before us in this interlocutory appeal, and we express no opinion regarding it.

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THE PEOPLE OF THE STATE OF COLORADO

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COLORADO SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

WILLIAM WELLS HOOD III,
Chief Deputy District Attorney
of the District Attorney
18th Judicial District
7305 S Potomac St - Ste 300
Englewood, CO 80112-4041

QUESTIONS PRESENTED

1. Whether this Court should review the Colorado Supreme Court's determination that the involuntary draw of Petitioner's blood was supported by probable cause and therefore did not violate Petitioner's rights under the Fourth Amendment to the United States Constitution.

2. Whether this Court should review the legal standard the Colorado Supreme Court applied in determining the involuntary blood draw did not violate Petitioner's rights under the Fourth Amendment to the United States Constitution.

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4. People v. Schall,
   59 P.3d 848 (Colo. 2002) 4,5,6,7,8,9

5. People v. Sutherland,
   683 P.2d 1192 (Colo. 1984) 4,5,6,8,9,10

6. People v. White,
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STATUTES

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In the Supreme Court of the United States

No. 02-1375

MARK SCHALL, Petitioner

v.

THE PEOPLE OF THE STATE OF COLORADO

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The People of the State of Colorado (the People) respectfully submit this BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

OPINIONS BELOW

The opinion of the Colorado Supreme Court is reported as People v. Schall, 59 P.3d 848 (Colo. 2002). The trial court's ruling granting the Petitioner's Motion to Suppress Evidence is unreported.

JURISDICTION

The judgment of the Colorado Supreme Court was entered on December 16, 2002. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. U.S. Const. Amend. IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. COLO. REV. STAT 18-3-106(b)(1). (See Appendix A)

3. COLO. REV. STAT. 42-4-1301.1(3). (See Appendix A)

STATEMENT

A. FACTUAL BACKGROUND

On April 2, 2001, at approximately 5:50 a.m., Colorado State Patrol troopers (CSP) were dispatched to an injury accident on Colorado Highway 85 in Douglas County. At 6: 15 a.m. the lead trooper from CSP arrived at the scene and observed a tractor-trailer blocking both lanes of the highway. Another tractor-trailer was turned over on its side in the ditch. The trooper also observed a silver BMW with extensive driver's side damage blocking the southbound lane of the highway. Emergency personnel had responded to the scene before CSP arrived. The driver of the tractor-trailer in the ditch was pronounced dead at the scene. The Petitioner, subsequently identified as the driver of the BMW, was airlifted from the scene in critical condition. The driver of the tractor-trailer still on the highway that collided with the BMW, escaped without any serious injury.

As part of the investigation, a CSP trooper interviewed Robert Thingvold at the scene of the accident. Mr. Thingvold

said that he was driving northbound on highway 85 in his tractor-trailer, while his brother John Thingvold followed in a similar vehicle. Robert Thingvold said he and his brother were trying to avoid hitting a BMW that weaved into the northbound lane while traveling southbound. Robert Thingvold stated that despite his efforts to avoid the BMW he collided with it. He also stated that John Thingvold was able to avoid hitting the BMW, but the evasive actions taken by his brother caused the tractor-trailer to run off the highway and flip over. Investigation at the scene did not reveal any impairment on the part of the Thingvolds. That investigation also revealed that the collision occurred in the northbound lane. Accident reconstruction at the scene also revealed no skidmarks left by the Petitioner. The inexplicable nature of the Petitioner veering into oncoming traffic also suggested to CSP that the Petitioner was intoxicated.

As the investigation at the scene continued, a trooper observed a small wooden box that contained what later tested positive for marijuana sitting on the road in the debris trail that spanned from the point of impact to the point where the BMW came to a stop. The box had an "S" on it, consistent with the Petitioner's name. The trooper then observed several broken beer bottles and one full beer bottle in the back seat of the BMW. At the scene, CSP did not know whether caps were on the bottles. In July of 2002, CSP learned that the caps had been on the bottles. The trooper also observed a heavy odor of an alcoholic beverage coming from the interior of the vehicle. After obtaining all of this information, a trooper advised dispatch to send another trooper to examine the Petitioner.

Troopers arrived at the hospital that was caring for the Petitioner. While at the hospital, CSP obtained two blood draws and a urine sample from the Petitioner, sometime between 7: 30 and 8:00 a.m. that morning. There is no evidence in the

record to suggest that the Petitioner consented to the collection of these samples. On April 5, 2001, the Colorado Department of Health (CDH) analyzed the first blood sample. The analysis indicated a blood alcohol content of .057. CDH re-analyzed that sample on April 19, 2001, with a result of .111. CDH analyzed the second draw on April 10, 2001 with a result of .077. On April 9, 2001, CDH analyzed the urine sample and it tested positive for the presence of alcohol and cannabis. Petitioner was charged with Vehicular Homicide pursuant to C.R.S. 18-3-106(1)(b).

B. PROCEDURAL BACKGROUND

The trial court found that at the time the chemical tests were performed, there was no evidence that the troopers had reason to believe the Petitioner was under the influence or even affected by alcohol. The court accordingly granted the Petitioner's Motion to Suppress Chemical Testing, finding that the tests were performed without a showing of consent or probable cause.

The People initiated an interlocutory appeal of the trial court's ruling on the Petitioner's Motion. This was an interlocutory appeal to the Colorado Supreme Court pursuant to Colorado Appellate Rule 4.1 and COLO. REV. STAT. 16-12-102(2). The Colorado Supreme Court held that probable cause existed for the involuntary blood draws. People v. Schall, 59 P.3d 848, 851 (Colo. 2002). Therefore, the blood draws did not violate the Appellee/Petitioner's rights under the Fourth Amendment to the United States Constitution. Id.

In making this determination, the Colorado Supreme Court applied the standard set forth in People v. Sutherland, 683 P.2d 1192, 1194 (Colo. 1984). The Sutherland test enumerates the criteria for determining whether a warrantless, non-consensual

blood draw, taken to test blood alcohol content, comports with the United States Constitution. See id. Under the Sutherland standard:

> (1) there must be probable cause for the arrest of the defendant on an alcohol-related driving offense; (2) there must be a clear indication that the blood sample will provide evidence of the defendant's level of intoxication; (3) exigent circumstances must exist which make it impractical to obtain a search warrant; and (4) the test must be a reasonable one and must be conducted in a reasonable manner.

Id.

Applying the Sutherland test, the court found the key point of contention to be whether probable cause existed to arrest the Petitioner for an alcohol-related driving offense. See Schall, 59 P.2d at 851. Ultimately, the court found that probable cause existed for the blood draw. Id. at 852. In making this determination, the court set out several facts that it used as the basis for its finding. Id. First, the Petitioner caused the accident by driving into oncoming traffic. Id. Second, no skid marks, animal remains or other obstructions were found that would have indicated that the Petitioner drove into oncoming traffic as an evasive measure. Id. Third, officers smelled the odor of an alcoholic beverage emanating from the interior of the vehicle. Id. Last, officers observed several broken and intact beer bottles in the vehicle, but could not immediately determine whether the bottles were opened prior to the accident. Id.

After holding that the requirements of the Sutherland test were satisfied, the Colorado Supreme Court reversed the trial court's ruling and remanded the case back for trial. Id. at 853. The Petition to this Court followed.

REASONS FOR DENYING THE PETITION

The Petition fails to present this Court with any novel questions of law, conflicts between federal or state jurisdictions, or other compelling reasons for this Court to grant review on a writ of certiorari. The Petitioner is requesting this Court to review a determination of whether a blood draw was obtained in violation of the Fourth Amendment to the United States Constitution. This Court has already addressed that same issue. The legal standard applied by the Colorado Supreme Court does not conflict with precedent set by this Court, any federal circuit, or any state court of last resort. Furthermore, the Colorado Supreme Court applied the correct legal standard in determining that the non-consensual blood-draw comported with the requirements of the Fourth Amendment. Petitioner's argument that an incorrect standard was applied is based only on protections created by Colorado's Legislature. That issue is a matter of state concern, thus not properly before this Court.

a) The Questions of Law Presented in this Appeal Have Been Addressed and Settled by this Court.

Petitioner presents questions of law that have already been settled by this court. This Court has previously addressed when a non-consensual blood draw may be obtained. See Schmerber v. California, 384 U.S. 757 (1966). In Schmerber, this Court analyzed four factors to determine when a non-consensual blood sample may be taken in accordance with the Fourth Amendment. Id. First, probable cause must exist to arrest the defendant. Id. at 768-69. Second, there must be a clear indication that the evidence being searched for will be found. Id. at 770. Third, exigent circumstances must exist justifying the failure to obtain a warrant. Id. at 770. Fourth,

the test itself must be reasonable and conducted in a reasonable manner. Id. at 771-72.

The Colorado Supreme Court has adopted the test set out in Schmerber to determine when a non-consensual blood draw may be obtained in accordance with the requirements of the Fourth Amendment. See Sutherland, 683 P.2d at 1194. The Colorado Supreme Court applied the standard announced in Schmerber and adopted in Sutherland in making its determination in the case below. See Schall, 59 P.3d at 851-53. Therefore, the Colorado Supreme Court's decision was based on law already established by this Court.

Because this Court has clearly articulated the criteria needed to obtain a non-consensual blood sample, there is no reason to re-examine that issue. Petitioner fails to present this Court with any novel question of law. Essentially, Petitioner is asking this Court to apply a previously announced, and well accepted, legal standard to a case that fails to present any significant factual distinctions from the myriad of other cases decided under the Schmerber standard.

b) The Colorado Supreme Court's Decision Does Not Conflict With the Current Body of Case Law in Other State or Federal Jurisdictions.

Petitioner asserts that the Colorado Supreme Court's decision conflicts with decisions of other courts in different jurisdictions. However, the Petition fails to present a single case where an actual conflict exists.

First, Petitioner cites People v. White, 492 So.2d 1163, 1164 (Fla. App. 1 Dist. 1986), as a conflicting decision. In White, the District Court of Appeal of Florida, First District held that a non-consensual blood draw was not supported by probable cause where the officer ordering the draw did not smell alcohol

on defendant's breath or know of the specific circumstances causing the accident. Id. at 1164. The officer had not talked to anyone or seen anything leading him to believe that alcohol was involved. Id. A treating paramedic detected the odor of alcohol on defendant's breath, but the officer was not aware of the paramedic's observation when he ordered the blood draw. Id.

The decision in White is not in conflict with the Colorado Supreme Court's decision in Schall. White is a case where the officer had no reason to believe the accident was alcohol-related. In the instant case, the officer was presented with several such indications. The officers were aware that Petitioner caused the accident by driving into oncoming traffic. Schall, 59 P.3d at 852. No skid marks, animal remains, or other obstructions where found that would provide an alternate explanation of why Petitioner was in the wrong lane. Id. The officers also smelled the odor of alcohol emanating from Petitioner's vehicle and saw several broken beer bottles in the vehicle. Id. Although the beer bottles were later determined to have been intact and full at the time of the collision, the extensive damage to Petitioner's vehicle prevented the officers from immediately making that determination. Id.

No conflict exists where two courts reach opposite conclusions based on entirely different facts.

Petitioner also cites State v. Jones, 49 P.3d 273, 281 (Ariz. 2002) as a conflicting case. However, Petitioner only states that that case stands for the proposition that drawing blood is a bodily invasion and therefore a search under the Fourth Amendment that requires probable cause. That same principle was announced in Schmerber. 384 U.S. at 768. Far from being in conflict with Jones, the Colorado Supreme Court's decision embodied that principle by holding that probable cause supported the blood draw. Therefore, Jones is not a conflicting

case, but one which sets out a well-accepted constitutional principle.

Finally, Petitioner cites Schmerber as a conflicting case. However, as stated above, the Colorado Supreme Court applied the standard set out in Schmerber in its analysis in Schall. No conflict can exist where both cases applied the same legal standard and reached the same conclusion in both cases.

Therefore, this Court would not be settling a conflict between different courts by granting the Petition.

c) The Colorado Supreme Court Applied The Correct Legal Standard.

Petitioner argues that the Colorado Supreme Court applied a relaxed standard by only requiring that a non-consensual blood draw be supported by probable cause to believe Petitioner committed an alcohol related driving offense. Petitioner's argument is misguided.

The Colorado Supreme Court applied the standard set out in Sutherland. The Sutherland standard was adopted from this Court's decision in Schmerber. In Schmerber, this Court analyzed four factors and determined that because each of those factors was met, the blood draw was constitutionally obtained. See Schmerber, 384 U.S. at 768-71. In Sutherland, the court adopted each of those factors as a requirement of a four-part test to determine the constitutionality of a non-consensual blood draw. See Sutherland, 683 P.2d at 1194. Petitioner only argues that the first prong of Sutherland test was an erroneous legal standard.

The first prong of the Sutherland, test requires probable cause to believe that the suspect committed an alcohol-related driving offense. See Sutherland, 683 at 1194. This prong was adopted from Schmerber. See Schmerber, 384 U.S. at 768

(finding that officer had probable cause to arrest petitioner and charge him with driving an automobile while under the influence of intoxicating liquor).

Schmerber never expressly required that officers have probable cause to believe the suspect committed an "alcohol-related driving offense" as opposed to any other kind of offense. However, by imposing this limitation, the Colorado Supreme Court has created a further restriction on the types of cases in which a non-consensual blood draw may be obtained. To the extent that the Sutherland standard is different from Schmerber, Sutherland affords greater protections to a defendant.

Petitioner's argument points out the various types of alcohol-related driving offenses in Colorado and notes that only some of those offenses allow a non-consensual blood draw. Essentially Petitioner's argument is that officers must have had probable cause to believe Petitioner committed Vehicular Homicide, not any alcohol-related driving offense, and therefore, the wrong standard was applied. Petitioner's argument is not a proper one for this Court to hear.

Colorado has statutorily restricted the types of offenses in which a non-consensual blood draw may be obtained. COLO. REV. STAT. 42-4-1301.1(3) states in the relevant part:

> No law enforcement officer shall physically restrain any person for the purpose of obtaining a specimen of such person's blood, breath, saliva, or urine for testing except when the officer has probable cause to believe that the person has committed criminally negligent homicide pursuant to section 18-3-105, C.R.S., vehicular homicide pursuant to section 18-3-106(1)(b), C.R.S., assault in the third degree pursuant to section 18-3-204, C.R.S., or vehicular assault pursuant to section 18-3-205(1)(b), C.R.S...

However, Schmerber did not place any express limitations on the types of offenses in which a non-consensual blood draw may be obtained. See Schmerber, 384 U.S. 757. The Colorado Legislature is free to adopt further restrictions that afford greater protection to suspects. Petitioner's argument focuses on whether a state law requires greater protection than this Court established as a constitutional minimum in Schmerber and Sutherland. That is a question of state law and, therefore, not a proper issue for this Court to decide. See Bell v. Maryland, 378 U.S. 226, 237 (1964) (noting the Supreme Court's tradition of deference to state courts on questions of state law).

CONCLUSION

WHEREFORE, the People respectfully request this Court to DENY the Petition for a Writ of Certiorari.

Respectfully submitted,

5/2/03 BY: _____

Date

WILLIAM W. HOOD, III
Chief Deputy District Attorney

APPENDIX A

1. COLO. REV. STAT 18-3-106(b)(1), Vehicular Homicide: If a person cooperates or drives a motor vehicle while under the influence of alcohol or one or more drugs, or a combination of both alcohol and one or more drugs, and such conduct is the proximate cause of the death of another, such person commits vehicular homicide. This is a strict liability crime.
2. COLO. REV. STAT. 42-4-1301.1(3), Expressed Consent for the taking of blood, breath, urine, or saliva sample – testing:

   Any person who is required to take and to complete, and to cooperate in the completing of, any test or tests shall cooperate with the person authorized to obtain specimens of such person's blood, breath, saliva, or urine, including the signing of any release or consent forms required by any person, hospital, clinic, or association authorized to obtain such specimens. If such person does not cooperate with the person, hospital, clinic, or association authorized to obtain such specimens, including the signing of any release or consent forms, such noncooperation shall be considered a refusal to submit to testing. No Law enforcement officer shall physically restrain any person for the purpose of obtaining a specimen of such person's blood, breath, saliva, or urine for testing except when the officer has probable cause to believe that the person has committed criminally negligent homicide pursuant to section 18-3-105, C.R.S., vehicular homicide pursuant to section 18-3-106(1)(b), C.R.S., assault in the third degree pursuant to section 18-3-204, C.R.S., or vehicular assault pursuant to section 18-3-205(1)(b), C.R.S., and ther

person is refusing to take or to complete, or to cooperate in the completing of, any test or tests, then, in such event, the law enforcement officer may require a blood test.